

VII. CONSULTATIVE REPORT ON GROUP 5 ISSUES

This portion of the report addresses issues concerning SGAT general terms and conditions, Track A, and Section 272. The record on these issues was developed through workshops and written filings including testimony, comments and briefs. The NDPSC also held a formal hearing on the issues

On General Terms and Conditions, Qwest filed the direct testimony of Larry Brotherson on March 30, 2001 and supplemental testimony May 11, 2001. Qwest also filed testimony of James H. Allen on May 11, 2001. AT&T filed Comments on May 4, 2001 and Supplemental Comments along with a supporting affidavit of John Finnegan on May 30, 2001 regarding General Terms and Conditions. Testimony of Daniel LaFrance was filed on behalf of XO Utah, Inc. Qwest filed rebuttal testimony of Larry Brotherson on May 23, 2001.

Qwest, AT&T and XO Utah filed briefs on the General Terms and Conditions issues.

Regarding section 272 requirements, Qwest filed testimony of Marie Schwartz and Judith Brunsting on March 30, 2001. AT&T filed the affidavit of Cory Skluzak on May 4, 2001 and the Supplemental Affidavit of Cory Skluzak on May 17, 2001. Qwest filed rebuttal testimony of Marie Schwartz and Judith Brunsting on May 23, 2001. Qwest, AT&T and the Wyoming Consumer Advocate Staff filed briefs on July 25, 2001. AT&T and Qwest both filed reply briefs on August 1, 2001.

The parties combined the testimony and briefing on Track A issues with their treatment of the public interest standard. Qwest filed the testimony of David Teitzel on March 30, 2001 and rebuttal testimony of Mr. Teitzel on May 23, 2001. AT&T filed an affidavit of Mary Jane Rasher on May 4, 2001. No other parties filed testimony on Track A, however, briefs on the Track A issues were filed by Qwest, AT&T, Sprint and the Wyoming Consumer Advocate Staff. Qwest and AT&T filed reply briefs.

The facilitator filed his report on the Group 5 issues on September 21, 2001.

On October 5, 2001, Qwest and AT&T filed comments on the report.

On September 19, 2001, the NDPSC issued a Notice of Hearing and a formal hearing was held as scheduled on October 29, 2001.

Qwest appeared at the hearing and presented testimony and evidence in support of their position. There was no appearance by intervenors. On November 30, 2001, Qwest filed a post-hearing memorandum on Group 5 issues.

The following is the NDPSC's Consultative Report on Group 5 Issues.

A. Track A Requirements

1. Background.

47 U.S.C. §271(c)(1)(A) sets forth what are known as the Track A Requirements. This section says:

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR. – A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

The FCC phrased the questions involved in interpreting this provision as follows in § 271 proceedings involving Ameritech:

In response, numerous parties argue that Ameritech has failed to satisfy various aspects of the section 271(c)(1)(A) requirement. In particular, these parties contest:

- (1) whether Ameritech has signed one or more binding agreements that have been approved under section 252;*
- (2) whether Ameritech is providing access and interconnection to unaffiliated competing providers of telephone exchange service;*
- (3) whether there are unaffiliated competing providers of telephone exchange service to residential and business customers; and*
- (4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.*¹³¹

¹³¹ Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Record, 20543, 20577-99 (1997) (Ameritech Michigan Order) ¶¶62-104.

2. Overview.

The workshops participants combined the testimony and briefing of Track A issues with their treatment of the public interest standard. That standard is addressed at 47 U.S.C. § 271(d)(3)(c), which requires a conclusion that the requested authorization under § 271 "is consistent with the public interest, convenience, and necessity." Questions about the degree of local-exchange market entry by competitors arise here under both standards. The facilitator determined, however, to consider the public interest aspects of market-share testimony and arguments combined here with Track A considerations when issuing the next workshop report, which will consider the QPAP.

The workshop report examined each of the four Track A questions framed by the FCC in the Ameritech Michigan Order.

3. Analysis of Evidence on Unresolved Issues.

a. Existence of Binding, Approved Interconnection Agreements

Qwest presented evidence demonstrating that, as of April 30, 2001, it had entered into 39 binding, approved Interconnection Agreements in North Dakota. The agreements included 21 wireline agreements, 9 wireless, paging, and EAS agreements, and 9 resale-only agreements. No participant disputed the existence of a substantial number of binding and approved agreements with competitive suppliers of local exchange services in North Dakota, or otherwise challenged compliance with this element of Track A compliance.

The facilitator recommended that Qwest has met the portion of the Section 271(c)(1)(A) requirement that it have signed one or more binding agreements that had been approved under Section 252.

The NDPSC agrees with the facilitator's recommendation.

b. Provision of Access and Interconnection to Competitors.

Qwest offered evidence that it is providing access to interconnection in North Dakota. As of April 30, 2001, Qwest had leased 28,023 unbundled loops to 12 CLECs in North Dakota. During the hearing before the Commission, Qwest further testified that it has leased 1,527 LIS trunks to CLECs in North Dakota.

No participant challenged Qwest's compliance with this element of Track A compliance.

The facilitator determined the § 271(c)(1)(A) requirement that Qwest provide access and interconnection to unaffiliated competing providers of telephone exchange service imposes neither geographic range, order volume number, nor market penetration requirements. The facilitator recommended that Qwest's un rebutted evidence addressing unbundled loop leases demonstrates that it meets the requirement that it be providing access and interconnection to unaffiliated competing providers of telephone exchange service.

The NDPSC agrees with the facilitator's recommendation.

c. Existence of Competing Residential and Business Service Suppliers.

This element of the Track A test addresses whether CLECs involved are actually providing telephone exchange services to residential and to business customers. The FCC has held that there need not be a CLEC that serves both residential and business customers; the test is whether collectively the CLECs in the state serve both customer types.¹³² Consideration of this issue is divided into three subparts, those being *Market Share of Competing Providers*, *Estimates of Bypass Lines*, and *Number of CLECs Serving End Users*.

(i) Market Share of Competing Providers

The FCC has made clear that this element of the Track A test is satisfied when a competing carrier is serving more than a de minimis number of end users.¹³³ AT&T cited the FCC's Ameritech Michigan Order as adopting the requirement that there be "an actual commercial alternative to the BOC" and as recognizing that "there may be situations where a new entrant may have a commercial presence that is so small that a new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a "competing provider."¹³⁴ AT&T argued that CLECs are serving a minuscule number of residential customers in the seven states (0.3% overall). AT&T calculated this number by dividing Qwest's estimated number of CLEC-served residential access lines by the total state population numbers testified to by Qwest.

The facilitator cited the FCC's Ameritech Michigan Order to state that "We do not read § 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a "competing provider."¹³⁵ The facilitator stated that AT&T's calculation of the percentage of residential users served by CLECs is unsound. The FCC has already decided it will not impose a market share test and it has deemed Track A to be satisfied at very low CLEC levels of penetration into the residential market. Therefore, the facilitator recommended, in the event that Qwest can

¹³² *Id.* at ¶ 82.

¹³³ *Id.* at ¶ 78.

¹³⁴ *Id.* at ¶ 75.

¹³⁵ *Id.* at ¶ 77.

demonstrate that it is providing service at the levels shown in its testimony, it should be considered to meet this element of the Track A standard.

The NDPSC agrees with the facilitator's recommendation and determines that competing carriers are serving more than a de minimis number of end users. Based upon the most recent information available at the time of the Commission's hearing, CLECs in North Dakota serve 9,075 end user customers through resale, 23,577 end users through UNE-P, and 12,246 customers through facility bypass for a total of 44,898 end users served by CLECs in North Dakota. With the exception of facility bypass customers, these numbers represented customers as of April 30, 2001. At the Commission's request, Qwest submitted a late filed exhibit updating these customer numbers through September 30, 2001. The updated information showed 9,466 (6,723 residential, 2,743 business) resold lines, 24,400 UNE-P lines, and 12,246 (6,939 UNE stand alone loop) facility bypass lines. This totals 46,112 end user customers served by competing carriers as of September 30, 2001

(ii) Estimates of Bypass Lines

In addition to the amount of leased unbundled loops discussed above, Qwest presented estimates of end users, as of April 30, 2001, served through facility bypass, divided between residential and business customers. For North Dakota, Qwest estimated 1,050 bypass lines consisting of 840 residential lines and 210 business lines. Qwest estimated this number of bypass lines based upon a news report on the market penetration of a CLEC in the City of Hillsboro. In other states, Qwest estimated the number of bypass lines by a methodology using numbers ported to CLECs. This methodology, however, yielded a negative number when applied in North Dakota and therefore was not appropriate for use in North Dakota. The facilitator determined that Qwest had made a credible showing that business and residential users are served through facility bypass. This showing was unrebutted by contrary evidence.

At the hearing before the Commission, Qwest testified that since the workshops it has obtained 911 data reported by the CLECs which report stand-alone unbundled loops and owned loops that are not managed through a Qwest switch. At the Commission's request, Qwest reported that as of September 30, 2001, the information showed a total of 12,246 CLEC bypass loops consisting of 5,369 business loops and 6,877 residential loops.

The NDPSC agrees with the facilitator's recommendation that end users in North Dakota are served through facility bypass divided between residential and business users that is not de minimis

(iii) Number of CLECs Serving End Users

Qwest presented a list of competitors serving end users in North Dakota and a general description of the services provided by those CLECs. In North Dakota, 6 such CLECs were listed.

AT&T did not address the individual CLECs cited by Qwest, but argued that the competitors could not be considered "a commercial alternative" to Qwest until they could handle large order volumes at commercial levels or until those competitors can provide service at the same level as Qwest can.

The facilitator determined there was no argument that the CLECs listed by Qwest do not provide the services claimed and that in 5 states, including North Dakota, Qwest's evidence demonstrates that at least 2 CLECs are providing residential service. The facilitator recommended that the record supports a conclusion that the Track A requirement that services be provided to residential customers is established in North Dakota.

The NDPSC agrees with the facilitator's recommendation.

d. Existence of Facilities-Based Competitors.

The last Track A question is whether competing telephone exchange service is being provided: (a) exclusively over CLEC telephone facilities, or (b) predominantly over such facilities in combination with the resale of the telecommunications services of another carrier. The FCC has held that a CLEC's "own" facilities include UNEs that it leases from the incumbent provider.¹³⁶ Qwest's estimation of access lines served by CLECs in its survey of services provided by CLECs in each state also addressed the question of what facilities were being used.

The facilitator recommended that because of the commonality of the evidence presented and the lack of specific challenges to what facilities were being used, the proposed conclusion set forth under the preceding issue, *Existence of Competing Providers of Residential and Business Service*, is equally applicable here.

The NDPSC agrees with the facilitator's determination.

4. Conclusion.

Qwest should be deemed to be in compliance with the Track A requirements of having entered into binding and approved interconnection agreements by which Qwest is providing access and interconnection to its network facilities for the network facilities

¹³⁶ *Id.* at ¶ 99.

of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers.

B. General Terms and Conditions

1. Background

Qwest's Statement of Generally Available Terms and Conditions (SGAT) is an offer for an agreement between Qwest and any requesting CLEC. Section 5.0 of Qwest's SGAT contains the General Terms and Conditions governing the relationship between the CLEC and Qwest. While these General Terms and Conditions are not part of a checklist item under the Act, they "are an integral part of how Qwest purports to implement its specific checklist requirements identified in the SGAT sections . . ."

2. Overview

The parties raised a total of 37 issues related to General Terms and Conditions. Nineteen of those issues were resolved during the Workshop. The remaining 18 issues were presented to the NDPSC with the facilitator's proposed resolution.

The issues resolved between the parties are discussed in the facilitator's Report on Group 5 Issues (Workshop 4 Report) beginning on page 17. The resolved issues include:

- SGAT Amendment Process
- Implementation Schedule
- SGAT Definitions
- Discontinuance of Specific Services
- Term of Agreement
- Proof of Authorization
- Payments
- Taxes
- Insurance
- Force Majeure
- SGAT Section 5.11 – Warranties
- Nondisclosure
- Agreement Survival
- Dispute Resolution
- Controlling Law
- Notices
- Publicity
- Retention of Records
- Network Security

The issues unresolved between the parties are discussed in the Group 5 Report beginning on page 23. The issues include:

- Comparability of Terms for New Products or Services
- Limiting Durations on Picked and Chosen Provisions
- Applying "Legitimately Related" Terms Under Pick and Choose
- Successive Opting Into Other Agreements
- Conflicts between SGAT and Other Documents
- Implementing Changes in Legal Requirements
- Second-Party Liability Limitations
- Third-Party Indemnification
- Responsibility for Retail Service Quality Assessments Against CLECs
- Intellectual Property
- Continuing SGAT Validity After the Sale of Exchanges
- Misuse of Competitive Information
- Access of Qwest Personnel to Forecast Data
- Change Management Process
- Bona Fide Request Process
- Scope of Audit Provisions
- Scope of Special Request Process
- Parity of Individual Case Basis Process with Qwest Retail Operations

The issue deferred on page 41 of the facilitator's report to the state commissions for consideration was:

- The Co-Provider Industry Change Management Process (CICMP).

The portion of the issue deferred on page 31 of the facilitator's report to the PAP workshop was:

- Overlap of provisions in the SGAT with the PAP. Qwest states that this issue regarding the interrelationship between the general damage provisions of the SGAT at section 5.8.2 and the QPAP is resolved by the inclusion of language at section 5.8.2 that is substantively the same as that sought by AT&T. The language added by Qwest states that "If the parties enter into a Performance Assurance Plan under this Agreement, nothing in this section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan.

The portion of the issue deferred on page 39 of the facilitator's report regarding the facilitator's recommended report by Qwest to the state commission to be considered at a future hearing or proceeding was:

- The determination whether Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its interfaces is appropriately minimized.

3. Analysis of Evidence

a. Comparability of Terms for New Products and Services

AT&T proposed a new SGAT Section 1.7.2 which would require that Qwest offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services were comparable.

Qwest opposed AT&T's proposed new section on numerous grounds: (a) that SGAT Section 5.1.6 already obligates Qwest to price new products and services in accordance with applicable laws and regulations; (b) that under the CICMP process, Qwest is obligated to allow CLEC input on new products before formally introducing them; (c) that Qwest rates are already subject to public service commission review under § 252(f)(2) of the Act; and (d) that the terms "comparable products and services" and "substantially the same rates, terms and conditions" are so vague as to invite lengthy and difficult to resolve issues.

The facilitator determined there are already established standards and methods for resolving disputes related to terms and conditions that Qwest may apply to offerings under its SGAT. Those standards are adequate to assure that such terms and conditions comport with Qwest's obligations under the Act and FCC requirements. AT&T's proposed SGAT section would introduce substantial uncertainty over the applicability of those standards and methods. Therefore, the facilitator determined that the SGAT change recommended by AT&T would introduce uncertainty and complexity in a type of situation that is already adequately addressed by the SGAT. The facilitator did not recommend adoption of AT&T's proposed SGAT section.

The NDPSC agrees with the facilitator's conclusion and no changes to Qwest's SGAT are required.

b. Limiting Durations on Picked and Chosen Provisions

AT&T argued it was improper for Qwest to limit CLEC access to provisions selected from other CLEC agreements to the termination date of the agreement from which the provisions were selected. AT&T argued that Qwest's limitations create barriers and delay to competition by demanding that interconnection provisions prematurely expire and thereby require CLECs to have to renegotiate every provision. AT&T states that this limitation will require the CLECs to arbitrate more agreements so they can have state commissions assign reasonable expiration dates to contract provisions. AT&T argues that neither the Act nor the FCC's orders support Qwest's position. AT&T states that that the FCC has made it clear that Qwest must "make available without unreasonable delay . . . any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party . . .

upon the same rates, terms and conditions as those provided in the agreement."¹³⁷ AT&T emphasized that in its rule the FCC said that the terms must be the same. Therefore, it is AT&T's position that if the original contract allowed a 2-year term, then the subsequent contracts must allow the same 2-year term.

Qwest responded that adopting AT&T's argument would allow CLECs, in succession, to indefinitely extend the duration of opted into provisions. Qwest also cited dicta from a case the FCC decided on other grounds:

*"[i]n such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date."*¹³⁸

The facilitator found a need for an appropriate means for changing over time the terms and conditions under which Qwest provides service to CLECs. AT&T's proposal would provide a major barrier to reflecting such change, particularly as it relates to cost. It would allow leapfrogging pick and choose decisions that could perpetuate prices long after the costs underlying them have changed. Absent compelling circumstances, it should be concluded that the duration of the agreement from which the provision is being picked or chosen forms an integral part of any substantive provisions that a CLEC seeks to use. Under this rule, a CLEC could take the provision from the agreement with the longest remaining duration, if it considered duration to be of primary importance. The facilitator recommended there should be no right, in the case of picking or choosing, to require Qwest to make an offering at a time beyond that for which it is already obligated. If a CLEC wants to do that, it should employ the Act's negotiation and arbitration provisions.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

c. Applying "Legitimately Related" Terms Under Pick and Choose

AT&T commented that Qwest had abused the "legitimately related" requirement by requiring adherence to other, peripheral SGAT requirements. AT&T cited a Qwest requirement (from a state that was not identified) that AT&T accept forecasting provisions before it could take advantage of a provision allowing access to trunk blocking reports. AT&T also cited a Wyoming instance where Qwest required AT&T, before opting into a single point-of-interconnection provision, to accept other (unidentified) provisions. AT&T argued these instances demonstrate a general failure to comply with the Act's § 252(i) requirement that an incumbent not require, as a condition for opting-into another agreement, adherence to terms and conditions not related to interconnection, services or elements being requested.

¹³⁷ 47 C.F.R § 51.809.

¹³⁸ *In re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug 3, 1999).

Qwest responded to AT&T's concerns by proposing SGAT Section 1.8.2 language, which stated:

In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related, including legal, technical or other considerations.

The NDPSC agrees with Qwest's proposed changes to SGAT Section 1.8.2, and finds Qwest has made the changes to SGAT Section 1.8.2.

Qwest also proposed to add the following language to SGAT Section 4.0:

"Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under § 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions.

Qwest noted the already existing language of SGAT Section 1.8.1 placed on Qwest the burden of demonstrating that any provision it sought to include was in fact legitimately related.

In its comments to the facilitator's Report, AT&T stated that it and Qwest had reached agreement on the Definitions included in Section 4.0 of the SGAT with the exception of the definition of "Legitimately Related." Qwest, in its Post-Hearing Memorandum filed with the NDPSC on November 30, 2001, also confirmed that the parties agreed on consensus language on the SGAT Section 4.0 Definitions with the exception of the definition of "Legitimately Related", and that Qwest will include the consensus language in its next SGAT filing.

The NDPSC agrees with the consensus definitions included in SGAT Section 4.0 of the SGAT with the exception of the term "legitimately related" as submitted by Qwest in its Post-Hearing Memorandum.

In addition, AT&T, in its comments to the facilitator's report, agreed that the first sentence in the proposed SGAT Section 4.0 definition of "legitimately related" is consistent with the law, but objected to the second and third sentences as being a creation of Qwest's that is neither reflective of what Qwest does nor consistent with the law. AT&T recommended that the second and third sentences in the proposed SGAT Section 4.0 be stricken, and that the NDPSC require Qwest to define its process

specifically and to include a mechanism to oversee and prohibit abuses. AT&T's proposed language for the term "legitimately related" in SGAT 4.0 is contained in AT&T's Exhibit 1 to AT&T's comments to the facilitator's report, and reads as follows:

"Legitimately Related" terms and conditions are those rates, terms, and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under § 252(i) of the Act, and not those relating to other interconnection, services or elements in the approved Interconnection Agreement. This definition is not intended to limit the FCC's interpretation of 'legitimately related' as found in its rules, regulations or orders or the interpretation of a court of competent jurisdiction.

The facilitator recommended that, when combined with the placing of the burden on Qwest to demonstrate a legitimate relationship, the new Section 1.8.1 and Qwest's proposed Section 4.0 provisions adequately limit Qwest's right to attach other provisions to those that a CLEC might pick and choose.

The NDPSC disagrees with the facilitator's recommendation concerning the definition of "legitimately related" contained in SGAT Section 4.0, and recommends that the definition proposed by AT&T be incorporated into SGAT Section 4.0.

The NDPSC finds that Qwest made the recommended change to the definition of "legitimately related" contained in SGAT Section 4.0 in its North Dakota SGAT Fifth Revision dated March 15, 2002.

d. Successive Opting-Into Other Agreements

AT&T argued that Qwest improperly refuses to allow a CLEC to opt into an agreement that itself is an agreement reached by another CLEC that made that agreement by opting into an agreement with a third CLEC.

The facilitator determined that once a CLEC has opted into an agreement of another, that opting CLEC's agreement has its own status as an interconnection agreement. It thus should acquire the ability to be "opted into" by yet another CLEC. The facilitator recommended that the SGAT should contain a provision stating:

Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or an entire agreement, solely because such provision or agreement itself resulted from an opting in by a CLEC that is a party to it.

The NDPSC agrees with the facilitator's recommendation and finds Qwest has made the recommended addition to its SGAT at Section 1.8.2.1.

e. Conflicts Between the SGAT and Other Documents

AT&T argued that a tariff filing should not have the effect of automatically amending any interconnection agreement or the SGAT. Qwest agreed to adopt language that would eliminate "conflicts" as the basis for deciding when there was incompatibility between the SGAT and other documents. The frozen SGAT makes it clear that the SGAT prevails over other documents that abridge or expand the rights or obligations of each party to the SGAT.

The facilitator determined that Qwest's frozen SGAT language contains a Section 2.1 statement that resolves the conflict of which tariff provision applies after a tariff is changed by providing the most recent version is applicable. Qwest's SGAT Section 2.3 prohibits the application of any new tariff provision, unless a public service commission decrees otherwise, that would conflict with the SGAT directly, or would abridge or expand any party's rights or obligations under the SGAT, even if there were no direct conflict. This provision provides sufficient protection against subsequent changes in tariffs. The Qwest language also precludes changing the SGAT by allowing the tariff to go in effect by operation of law. The Qwest language addresses the broader concern about the proper method for assuring that other kinds of documents do not override SGAT provisions. Finally, the facilitator determined the SGAT should, as it does, remain silent on the question of whose interpretation of consistency prevails when disputes remain in the process of resolution.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

f. Implementing Changes in Legal Requirements

AT&T objected to the SGAT provisions that require the SGAT terms to conform to changes in law as soon as the decisions making those changes become effective. AT&T recommended that the SGAT provide for a period of time for parties either to: (a) mutually agree to change their interconnection agreement after a ruling; or (b) resolve disagreements about the change through the SGAT dispute resolution procedures.

In response, Qwest brought to the workshop a revised SGAT Section 2.2 to allow a 60-day status quo period to allow negotiation of disagreements about whether a change in law would require a change in the SGAT. After that period, the SGAT dispute resolution provisions would apply, with allowance for creating an interim operating arrangement pending completion of the procedures called for by those provisions. Qwest's language would make the eventual resolution of the dispute effective back to the effective date of the change in the existing rules.

The facilitator determined the new SGAT language provides for a reasonable means of accomplishing SGAT changes resulting from changes in the law. The proposed "true-up" mechanism is also appropriate, because it allows an outside dispute

resolver to temper any resolution, if deemed appropriate. The facilitator recommended that if Qwest included the proposed language in the SGAT, it would adequately protect CLECs in the event that changes to the SGAT become necessary as a result of such outside factors.

The NDPSC agrees with the facilitator's recommendation and finds that the North Dakota SGAT does include the modified SGAT language at Section 2.2.

g. Second Party Liability Limitations

AT&T objected to the scope of Qwest's SGAT Section 5.8 agreement to bear liability, arguing that the scope was too narrow to compensate CLECs for damages, and to provide an adequate incentive for Qwest to provide good service after it receives Section 271 approval. AT&T specifically argued that Qwest's limitations of liability are so narrowly drawn that they undermine Qwest's incentives to perform under interconnection agreements, its SGAT, and the Act. AT&T stated that Qwest's limitations create a disincentive or barrier to competition for the CLECs. AT&T also argued that, although the provisions are reciprocal, by and large, the proposed limitations protect Qwest and not the CLECs because Qwest is the primary supplier of services and access to the local market. AT&T requested changes to the SGAT to cover the following:

- Section 5.8.1: Address the parties' liability for damages assessed by a public service commission.
- Section 5.8.2: Change Qwest's language addressing the inter-relationship between these general damages provisions and the Qwest post-entry assurance plan (PAP or QPAP).
- Section 5.8.3: Removing Qwest's provision limiting damages to the amount that would have been paid for services under the SGAT.
- Section 5.8.4: Allowing consequential damages for gross negligence (Qwest limited it to willful conduct) and for bodily injury, death, or damage to tangible property caused by negligence.
- Section 5.8.6: Expanding Qwest's liability for fraud by CLEC customers to any applicable theory of liability (Qwest limited it to its own intentional conduct).

Qwest argued that SGAT Section 5.8 aims at limiting the potential liability of each of the parties to each other and to third parties in a way that is both consistent with established industry practice and comports with existing state law. In its brief, Qwest argued that SGAT Section 5.8.1 captures the traditional tariff limitation that limits liability to the cost of services that were not rendered or were improperly rendered to the end user. With regard to SGAT Section 5.8.2, Qwest stated in its brief that in response to AT&T's suggestion, Qwest added language to Section 5.8.2 to resolve AT&T's concerns relating to how the limitations section will account for payments under the PAP. Qwest removed the entire Section 5.8.3 from its SGAT. Qwest argued that the expansion of

liability requested by AT&T in Section 5.8.4 was not consistent with industry practice. Qwest argues that the AT&T changes to Section 5.8.6 would also unduly expand Qwest's liability and would deviate from established industry practice.

Regarding Section 5.8.4, the facilitator determined it was not appropriate for Qwest to exclude liability for damage to the tangible property of one party to the SGAT, where the damage results from acts or omissions by the other party. Therefore, the facilitator recommended the SGAT should contain the following provision at Section 5.8.4:

Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such party's negligent act or omission or that of their respective agents, subcontractors or employees.

With respect to SGAT Section 5.8.6, the facilitator recommended the following change regarding liability where Qwest is the only party whose acts or omissions contributed to the perpetration of fraud by an end user customer:

A CLEC is liable for all fraud associated with service to its customers. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless: (a) such fraud is the result of any act or omission by Qwest, and (b) the ability to perpetrate such fraud was not contributed to by an act or omission by a CLEC. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's customers, Qwest will promptly inform CLEC and at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud or such action as possible.

The facilitator made no recommendation concerning Section 5.8.1 except to note in his discussion of the issues that it is "addressed in the next succeeding issue." The NDPSC does not know what the facilitator meant by that statement. However, the NDPSC believes that Qwest's proposed language in SGAT Section 5.8.1 is appropriate and is acceptable to the NDPSC.

The facilitator recommended that the provisions of SGAT Section 5.8.2 should remain as Qwest has proposed. Otherwise, Qwest's exposure to damages becomes extended beyond the point that is reasonable in light of general, commercial and telecommunications tariff experience. The facilitator determined that the degree to which the provisions in the SGAT overlap with the PAP and the question of what to do about that overlap cannot be meaningfully addressed without considering the matters being addressed in connection with the PAP. Therefore, it is necessary to defer consideration of this issue as it relates to Section 5.8.2 until the forthcoming report that will address the PAP. The NDPSC agreed with the facilitator's recommendations concerning SGAT sections 5.8.4 and 5.8.6. Qwest states that this issue regarding the

interrelationship between the general damage provisions of the SGAT at section 5.8.2 and the QPAP is resolved by the inclusion of language at section 5.8.2 that is substantively the same as that sought by AT&T. The language added by Qwest states that "If the parties enter into a Performance Assurance Plan under this Agreement, nothing in this section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan. The issue of Qwest's limitations of liability and Qwest's incentives to perform under interconnection agreements is discussed further in the Consultative Report on Qwest's Performance Assurance Plan section of this report.

The NDPSC agrees with the facilitator's recommendation regarding SGAT Section 5.8.4 and finds that Qwest has made the recommended modification to its SGAT.

With regard to SGAT Section 5.8.6, Qwest explained in its comments to the Facilitator's Group 5 Report that the facilitator's recommended modification of Section 5.8.6 was excluded from the SGAT due to consensus changes to Section 11.34 that were reached subsequent to the multi-state proceeding. Because of these changes, the parties agreed that the facilitator's proposed change to Section 5.8.6 was moot. The NDPSC accepts the consensus language and the deletion of Section 5.8.6.

h. Third Party Indemnification

Qwest explained that third-party indemnification is intended to determine whether an ILEC or CLEC has liability where a third-party seeks damages against both the ILEC and the CLEC. AT&T argued that SGAT Sections 5.9 indemnity provisions must complement the Section 5.8 liability-limitation provisions and the PAP to provide an incentive for Qwest to avoid anticompetitive and discriminatory conduct. AT&T argued that the indemnity provisions of the SGAT must work hand-in-hand with the SGAT tariff limitations of liability and the PEPP/PAP plans to create sufficient incentives for monopolists to "play fair" and not engage in anti-competitive and discriminatory conduct.

Qwest responded that the indemnity language did reflect a market-based approach. Qwest also noted that making a wholesale supplier broadly responsible for claims by the wholesale customer's end users would discourage the wholesale customer from imposing reasonable limits on this liability to its end users, because it could simply transfer those liabilities back to its wholesale service provider. Qwest's proposed SGAT Section 5.9.1.2 would protect itself by requiring the CLEC to indemnify Qwest for any damages sought by the CLEC's end user.

The facilitator determined the typical market custom is to impose significant limits on customer compensation in the event of failure to deliver service. A competitive market analogy would strongly indicate that AT&T's request to transfer to Qwest the cost of relatively liberal damage responsibilities, vis-à-vis the CLEC's end users, is not appropriate. The record demonstrates that Qwest's SGAT provisions concerning indemnity, insofar as it involves CLEC end users, better reflect the competitive-market

mirroring test that AT&T proposed. The facilitator, however, expressed concern about Qwest's SGAT Section 5.9.1.2 that could indemnify Qwest in cases where its negligence caused bodily injury to CLEC customers or physical injury to their tangible property. Therefore, the facilitator recommended that SGAT Section 5.9.1.2 should include a new sentence as follows:

The obligation to indemnify with respect to claims of the Indemnified Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents or other representatives of the Indemnifying Party.

Qwest noted in its Post-Hearing Memorandum on Group 5 Issues that the facilitator's recommended addition to Section 5.9.1.2 contains an apparent error in that the placement of the term "indemnifying party" and "indemnified party" were reversed. By electronic mail on December 5, 2001, the facilitator confirmed that the terms were reversed in error in the Facilitator's Group 5 Report.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has modified its SGAT at Section 5.9.1.2 in accordance with the facilitator's recommendation.

i. Responsibility for Retail Service Quality Assessments Against CLECs

XO argued that Qwest should be responsible for assessments or fines levied against a CLEC that fails to meet a state commission's retail performance standards because of a failure by Qwest to provide the CLEC with SGAT-compliant service. It is noted that XO is not an intervenor in North Dakota.

The facilitator determined that XO's proposal might not be consistent with each state's policy regarding such assessments. The superior way to deal with CLEC concerns about such "vicarious liability" is for them to make arguments in proceedings that either establish such standards and assessments in the first place, or in cases that are open to enforce them.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

j. Intellectual Property

There were disagreements at the Workshop about SGAT Section 5.10, which deals with intellectual property. The parties then represented that agreement had been reached on a revised Section 5.10. The facilitator noted there were only minor

differences between the language appended to AT&T's brief and the language included in Qwest's frozen SGAT. The facilitator recommended this issue be closed in the absence of comments to the contrary within the 10-day period established for filing comments on the Report.

In its comments to the Report, AT&T stated it would converse with Qwest to determine if there was consensus on this issue. In its comments to the Facilitator's Report, AT&T stated that the language in Qwest's SGAT Sections 5.10.1 through 5.10.8 is consensus language and the issue could be closed. In its Post-Hearing Memorandum, Qwest confirmed the parties were in agreement on the language contained in Qwest's SGAT. The NDPSC recommends the issue be closed and that no modifications to Qwest's SGAT are necessary.

k. Continuing SGAT Validity After the Sale of Exchanges

AT&T proposed a series of provisions that would apply upon the sale by Qwest of exchanges that include end users whom CLECs serve through services acquired under the SGAT. AT&T's proposed changes would:

- Require the written agreement of Qwest's transferee to be bound by the SGAT terms and conditions until a new agreement between the transferee and CLEC becomes effective
- Provide notice of the transfer to CLECs at least 180 days prior to completion (AT&T agreed in its brief to less notice if 180-day notice could not be provided)
- Obligate Qwest to use best efforts to facilitate discussions between the transferee and CLECs with respect to SGAT continuation
- Require Qwest to serve a copy of the transfer application on CLECs
- Deny Qwest the ability to contest CLEC participation in the transfer approval proceedings or to challenge the Commission's authority to consider obliging the transferee to assume the SGAT obligations.

Qwest agreed to provide a notice of transfer to the CLEC and to facilitate discussions between the transferee and the CLEC with respect to SGAT continuation but objected to the remainder of AT&T's proposals.

The facilitator determined that because requirements applicable to Qwest and the transferee may well differ, CLECs should not have the unilateral right to continue the SGAT indefinitely. However, they should have a reasonable opportunity to either negotiate with the transferee or to seek relief from the Commission in the event that negotiations are not sufficient. The facilitator recommended that Qwest should provide notice of the transfer sufficiently in advance of its proposed effective date to permit the end-user transitions, transferee/CLEC negotiations, and CLEC requests to commissions discussed earlier. The facilitator recommended a new subparagraph to SGAT Section 5.12 as follows:

In the event that Qwest transfers to any unaffiliated party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of such transfer or until such time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

In its comments to the facilitator's Report, AT&T requested that the reference to "unaffiliated party" be removed from the language proposed by the facilitator and that Qwest be required to give notice to CLECs of "completion" of such transfer.

At the hearing before the NDPSC, Qwest stated that by including the "unaffiliated party" language, Qwest was simply trying to make clear that if Qwest sold to some unaffiliated third party, that third party would be the one to negotiate a new agreement. Qwest stated that if Qwest could and did sell to an affiliate, that affiliate would be bound by the terms Qwest had agreed to, and Qwest believes that is what the Act requires. The NDPSC finds no reason to remove the reference to "unaffiliated" transferees. The NDPSC agrees with the facilitator's recommendation and believes the removal of the "unaffiliated party" reference would broaden SGAT Section 5.12 beyond its intended application.

At the hearing before the NDPSC, the NDPSC staff expressed concern that the 90-day provision was ambiguous because there is no identification as to the stage of the transfer proceeding when the 90-day period will commence. The NDPSC recommends that notice be given to CLEC after all required state and federal approvals for the transfer have been issued and that the 90-day period should begin upon notice to the CLEC. The NDPSC believes that this 90-day period after all approvals for transfer have been issued is appropriate time for the CLEC and the transferee to negotiate a new agreement or seek relief from the Commission. The NDPSC recommends that language be included in the facilitator's recommended new subparagraph to SGAT Section 5.12 to incorporate the NDPSC's recommendation that notice be given to CLEC after all required state and federal approvals have been issued and that the 90-day period will begin upon notice to the CLEC.

The NDPSC finds that Qwest made the recommended change to Section 5.12.2 in its North Dakota SGAT Fifth Revision dated March 15, 2002.

I. Misuse of Competitive Information

AT&T provided evidence that Qwest contacted a Minnesota end user, who happened to be an AT&T employee, to secure a rescission of the customer's election to transfer to AT&T. This contact was made between the time that AT&T had submitted an LSR and the time that the transfer was to take place. AT&T argued this contact showed an abuse of Qwest's obligation not to disclose information to its marketing and sales personnel. AT&T argued that Qwest should not be deemed to be in compliance with the requirements of Section 271 until it "demonstrates that it has corrected every mechanism through which Qwest's retail marketing personnel gain access to CLEC confidential customer information." Qwest did not brief this issue.

The facilitator stated that abuse of information that Qwest gains through the ordering systems that CLECs use to secure facilities or services that will deprive Qwest of existing end users is a very serious matter. The facilitator determined, however, that the single incident cited by AT&T does not support a broad conclusion that Qwest's performance fails in meeting § 271 requirements, or that there exists a need for imposing a potentially very substantial remedial plan. Nonetheless, the facilitator recommended that Qwest should submit a report to the Commission within 30 days detailing its programmatic efforts addressing steps to: (a) minimize the possibility of, (b) discourage, (c) detect, or (d) punish inappropriate conduct in the use of sensitive information. The report is to be designed to allow the Commission to make a finding that Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its GUI and EDI interfaces with CLECs is appropriately minimized.

The NDSPC agreed with the facilitator's recommendation and finds that Qwest filed the requested report on October 22, 2001. On October 24, 2001, the NDSPC granted AT&T's request to examine Qwest's report and to augment the record. The NDSPC considered Qwest's report at an informal hearing on March 20, 2002. Notwithstanding its request to augment the record, AT&T did not file any information in response to Qwest's report prior to the informal hearing. At the informal hearing, the NDSPC allowed AT&T to submit its response to the Qwest report as a post-hearing filing, which it did and to which Qwest filed a reply.

Qwest's report describes its corporate compliance program, which encompasses Qwest's confidentiality obligations regarding the use of proprietary information received from CLECs. Key elements of the compliance program include: (1) a code of conduct which establishes a standard of business conduct to ensure that business decisions follow Qwest's commitment to ethics, Qwest policy and applicable laws. Employees complete annual code of conduct training on the code which requires that customers who are also competitors must not be disadvantaged in the level of service that Qwest provides to them and specifically highlights as forbidden conduct the improper use of wholesale customer's customer proprietary network information; (2) corporate policies which provide more detailed information and resources for implementing the expected

business conduct outlined in the code of conduct; (3) acknowledgement by employees indicating that they understand and will adhere to the code and supporting policies; (4) mandatory annual code of conduct training for all employees; (5) an Internet site available to all employees with electronic versions of the code and policies; (6) disciplinary action up and to include termination of employment, civil action, restitution and/or reports to appropriate government agencies; and (7) an advice line maintained by Qwest for employees to access in the event they need advice on the code and policies or to make an anonymous report of suspected conduct.

AT&T argued that Qwest failed to prove its compliance with the Act's requirements regarding confidentiality of wholesale customer information, and that Qwest has failed to demonstrate that it is not engaging in anticompetitive conduct. AT&T stated in its written response to Qwest's report that Qwest's report describes a list of programs that allegedly ensure that wholesale customer information is protected in accordance with law, but that Qwest does not discuss specifically how any employees are instructed to actually use or not use, disclose or not disclose, and protect wholesale information or wholesale customers.

Qwest has guidelines in place that outline the access and use of carrier information by Qwest retail sales/marketing, wholesale markets, and public policy organizations. These guidelines address the obligations of confidentiality with respect to the use of proprietary information received from other carriers, including services ordered and/or used by specific carriers. Qwest's retail sales/marketing personnel are instructed that they may not use carrier proprietary information for retail marketing or competitive purposes.

Qwest's FCC/Regulatory Compliance Managers require all Qwest supervisors to communicate confidentiality guidelines to their employees. Qwest's supervisors, in turn, are responsible for ensuring that their employees are trained, understand, and follow these guidelines. FCC/Regulatory Compliance Managers also help ensure continuing adherence to the guidelines by issuing advisory reminders to supervisors. These managers communicate new and reinforce existing legal and regulatory requirements, participate in the development of annual training, develop and conduct ongoing regulatory compliance training, develop and conduct training on new federal and state orders, and answer client questions. Finally, the managers address alleged state and federal violations of Qwest guidelines in accordance with Qwest's discipline plan, including investigating alleged violations, documenting all cases of alleged violations and initiating disciplinary action as needed.

Qwest's wholesale division to protect the confidentiality of CLEC LSRs to switch service from Qwest to a CLEC uses processes and procedures. LSR information is received by the SOP (Service Order Processor). Security exists within the SOP that only allows wholesale users to access wholesale service orders. Employees in other Qwest divisions cannot access CLEC wholesale service order information. Wholesale

division employees receive compliance training on their obligation to protect the confidentiality of CLEC information.

Qwest's retail sales and marketing personnel are prohibited from using proprietary information received from other carriers. Qwest supervisors are charged with ensuring that employees are trained in their obligations regarding the use of proprietary information and that employees vigorously adhere to their obligations. Although Qwest has a marketing program directed to former Qwest customers who have left Qwest for competitive reasons, Qwest sales/marketing personnel do not use CLEC confidential information for marketing purposes. After a Qwest customer has disconnected service, the disconnect information is collected through the Customer Data Warehouse ("CDW") database. The CDW is a Qwest database which contains no information provided by CLECs to Qwest. Qwest Customer Service Records ("CSRs") are available to Qwest retail employees, who are required by the system every time that they access a record to note the reason why they accessed the record. The system automatically records the identity of the employee accessing the record. Qwest has security devices to detect whether anyone accessing a record has circumvented the system's notification requirements or identification features.

If a Qwest customer is scheduled to have service switched to another provider by an LSR, a notation of a pending disconnect, but not the identity of the new carrier is placed on the CSR by Qwest's wholesale organization. The Qwest wholesale organization does not notify the Qwest retail organization of the notation, or the pendency of the LSR, nor is the LSR or the content of the LSR accessible to the Qwest retail organization. Qwest's sales and marketing personnel do not have the ability to search the CSR database globally for notations that would indicate a customer's service is being switched to another carrier. Nor, does Qwest have any sales program to identify and retain customers when Qwest is informed by the CLEC of a customer who may wish to leave Qwest for another carrier. Qwest's retail sales personnel would only see a notation of a pending disconnect by happenstance if they had occasion to access a CSR for a business purpose and the notation were present. If such personnel were to see the notation, there are instructed not to use it for sales or marketing purposes. Once a customer's request to switch service providers has been completed, the CSR is no longer accessible by Qwest retail sales or marketing personnel.

The NDPSC has not received any complaints from customers or CLECs in North Dakota of similar instances to that alleged by AT&T to have occurred in Minnesota.

The NDPSC finds that Qwest has in place a reasonable and comprehensive program for assuring inappropriate use of competitive information received through its ordering system is properly minimized.

m. Access of Qwest Personnel to Forecast Data

XO commented that Qwest legal personnel should not have free access to aggregated CLEC forecast information to use in regulatory filings. XO concluded that the SGAT should preclude use of CLEC confidential information for any purpose other than that for which it was provided.

AT&T expressed concerns about both the sufficiency of the description of those that can see individual CLEC forecast information and about the ability of Qwest to make free use of aggregated CLEC forecast information.

Qwest responded that SGAT Section 5.16.9.1 and 5.16.9.1.1 would prohibit the disclosure of both individual and aggregated CLEC forecast data to its marketing, sales and strategic planning personnel. Qwest also said that the language in question allows access to individual CLEC forecasts only by those Qwest personnel who need to have it for use in responding to the forecast at issue.

The facilitator determined Qwest's language does generally limit individual forecast information to those with a need to use the information to manage Qwest's contractual relationship with the CLECs who provided it. The list of authorized recipients is appropriately limited. However, the facilitator determined the language allowing access by Qwest's legal personnel is more open ended than it needs to be. Therefore, the facilitator recommended that the phrase "legal personnel, if a legal issue arises about that forecast" in SGAT Section 5.16.9.1 should be replaced with:

Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.

The facilitator also determined that SGAT Section 5.16.9.1.1, which allows Qwest to file or use aggregated CLEC data for any regulatory filing or any other purpose generally related to fulfilling its SGAT obligations, is too open ended. The facilitator recommended Qwest should be permitted to provide the data upon a specific Commission order requiring it, upon the initiation by Qwest of any protective processes applicable in the state requiring, and upon notice by Qwest of the CLECs involved on a basis that the Commission involved determines to be sufficient to permit the completion of any procedures required to continue to protect its confidentiality. The facilitator recommended the following replacement language for SGAT Section 5.16.9.1.1:

Upon a specific order of the Commission, Qwest may provide the forecast information that CLECs have made available to Qwest under the SGAT, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provide such notice as the Commission directs to the CLECs

involved, in order to allow it to prosecute such procedures to their completion.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended modifications to its SGAT at Sections 5.16.9.1 and 5.16.9.1.1.

n. Change Management Process

AT&T cited the FCC's SWBT Texas 271 Order¹³⁹ as requiring existence of a change management process that meets the following specific criteria:

- Clearly organized and readily accessible change management process information
- Substantial CLEC input into the creation and operation of the process
- Existence of a procedure for timely dispute resolution
- Availability of a stable test environment that mirrors production
- Adequacy of documentation available for use in building an electronic gateway

The FCC has also examined whether a BOC has demonstrated a "pattern of compliance" with its own change management plan and whether the BOC has provided adequate technical assistance to CLECs in using the BOC's OSS.¹⁴⁰

The facilitator determined that the Workshop record did not allow meaningful consideration of the sufficiency of Qwest's Co-Provider Industry Change Management Process (CICMP), which forms part of Section 12.2.6 of the SGAT.

Qwest stated that Qwest and the CLEC community met to redesign Qwest CMP. The results of the CMP redesign effort were incorporated into the record in this proceeding in several ways, including the filing of periodic reports. The NDPSC has reviewed those reports as well as filings and presentations by the parties in an informal hearing held on March 20, 2002. Qwest filed a brief supporting its position and AT&T, Covad and WorldCom (AT&T/Covad/WorldCom) filed a joint brief supporting their positions regarding Qwest's Change Management Process. Qwest also filed reports on the status of change management redesign on April 16, and May 15, 2002, and on May 2, 2002, Qwest filed comments demonstrating satisfaction of the FCC's Section 271 change management evaluation criteria. No CLEC has filed comments with the NDPSC on these reports.

Qwest stated in its brief and subsequent comments that Qwest and the CLEC community have reached agreement on all material aspects of Qwest's CMP.

¹³⁹ *SWBT Texas 271 Order* at ¶ 108. (Complete cite in Cumulative Consultative Report)

¹⁴⁰ *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20865 (App. D, ¶140); see also *Massachusetts 271 Order*, 16 FCC Rcd at 9046 (¶103), citing *Texas 271 Order*, 15 FCC Rcd at 18404 (¶108).

AT&T/Covad/WorldCom argued that Qwest not be deemed to be in compliance with its CMP until Qwest provides actual, demonstrable and verifiable evidence showing:

1. that the final draft of the CMP redesign document is clearly organized and readily accessible to competing carriers (not merely an incomplete draft available on a web site);
2. that competing carriers had substantial input into the redesign by Qwest's actual incorporation of all the agreements into its final CMP document;
3. that the final CMP defines a procedure for timely resolution of disputes and that Qwest is actually adhering to that procedure;
4. that the SATE is, in fact, a stable testing environment that mirrors production;
5. that the efficacy of Qwest's CMP documentation is demonstrated by Qwest actually following the process outlined therein and all third party observations and exceptions have been resolved; and
6. that, consistent with its promises during the § 271 workshops, Qwest has adequately updated its technical publications and PCAT to be consistent with its SGAT.

The NDPSC recognizes that Qwest and the CLECs are continuing to work on the redesign of Qwest's Change Management Process. The status reports filed by Qwest show that the parties have achieved significant progress. Despite the fact that the redesign work on the CMP is continuing, the NDPSC finds that the record demonstrates that Qwest's Change Management Process, as well as its technical assistance, EDI documentation, and stand-alone test environment (SATE), satisfy the FCC's requirements for Section 271 checklist compliance. In particular, the NDPSC finds that:

(i) Information relating to the change management process is clearly organized and readily accessible to competing carriers.

Qwest maintains a website that sets forth the current change management process, including the method for proposing and processing CLEC-originated and Qwest-originated OSS interface change requests and CLEC-originated product and process change requests.¹⁴¹ Those procedures are set forth in a document that is known as the Interim Draft Master Red-lined CLEC-Qwest CMP Redesign Framework ("CMP Framework"). This document contains agreements reached through extensive negotiations between the CLEC community and Qwest regarding the redesign of Qwest's change management process.¹⁴² The change request process provides that

¹⁴¹ The Qwest change management website can be found at the following URL: <http://www.qwest.com/wholesale/cmp/redesign.html>.

¹⁴² See Interim Draft Master Red-lined CLEC-Qwest CMP Redesign Framework (Dec. 10, 2001, version), which can be found at the following URL: <http://www.qwest.com/wholesale/cmp/redesign.html> (hereafter "CMP Framework").

all change requests are presented to the CLEC community for discussion and modification at monthly meetings of CLEC and Qwest representatives. The website also includes a wealth of other information about the change management process, including change requests and their status, a history of the action taken on each request, the schedule for systems and product/process change management meetings, and links to OSS documentation and a list of release notifications relating to that documentation.

(ii) Competing carriers have substantial input in the design and continued operation of the change management process.

CLECs currently have substantial opportunities for meaningful input into Qwest's change management process. Qwest and the CLECs jointly participate in a forum (the Change Management Process or "CMP") for managing and reviewing changes related to Qwest's systems, products, and processes that support the five categories of OSS functions (pre-ordering, ordering, provisioning, maintenance and repair, and billing). Since September 1999, CMP meetings have taken place at least once each month.

Qwest's current change management process, which includes elements that have already been implemented as a result of the CLEC-Qwest CMP redesign effort, sets forth procedures for managing changes to Qwest's systems, documentation, wholesale products, and processes by which CLECs conduct business with Qwest. Qwest provides CLECs with change management notification and documentation for changes pursuant to mutually agreed-upon timelines and intervals. The process expressly provides for CLEC input in the form of discussion regarding all change requests (including those initiated by Qwest) at the monthly meetings, and the opportunity to discuss, clarify, and comment on Qwest's responses to change requests. In addition, the process provides for CLEC input on interface change requests that are to be implemented, via walk-throughs and CLEC comment cycles.

By agreement of the parties, the redesign team decided to address systems issues first and product/process issues second. The systems issues appear now to have been resolved.

Qwest's change management process also sets forth the process and timeline for the introduction and retirement of OSS interfaces and changes to existing OSS interfaces, including implementation timelines that expressly provide for written CLEC input. The NDPSC is satisfied with Qwest's current change management process, including elements that have been implemented as a result of the redesign effort, provides for substantial CLEC input into redesign and operation of the process.

Qwest's asserted commitment to improving its change management process through collaborative redesign process, begun in July 2001, supports this conclusion. This effort provides an opportunity for CLECs and Qwest jointly to redesign the CMP by expanding its scope, developing and documenting more detailed processes, improving

notification intervals, and establishing meeting standards. Qwest has filed periodic status reports on the change management redesign process, most recently on May 15, 2002. The redesign process operates on a parallel track with Qwest's ongoing change management process described in the preceding paragraphs.

Significantly, the parties to the redesign process have already agreed that even after negotiations are completed, there will be provisions under the CMP to manage changes to the CMP. Qwest's change management procedures also will be incorporated into its SGAT (Section 12.2.6). The governing document for change management will be attached to the SGAT at Exhibit G.

(iii) The change management process defines a procedure for the timely resolution of change management disputes.

Qwest's change management process contains escalation and dispute resolution procedures that were developed jointly by Qwest and the CLECs. At the CLECs' request, that escalation process has been streamlined, and now offers CLECs a single point of contact for a given issue. The Qwest single point of contact is responsible for providing a final binding position regarding the escalated issue. If an impasse develops, a CLEC or Qwest may bypass the escalation process and immediately invoke the dispute resolution process. If the parties agree, the dispute can be resolved through an alternative dispute resolution process; alternatively, a CLEC or Qwest may submit the issue to an appropriate regulatory agency. In addition, Qwest and the CLECs have agreed to procedures for voting and impasse resolution that apply to the redesign effort itself.

(iv) Qwest has demonstrated a pattern of compliance with its change management procedures.

Qwest has demonstrated a pattern of compliance with its change management procedures. In Qwest's processing of change management requests, it has met its obligations with regard to the following: conducting meetings to clarify CLEC change requests; tracking and documenting the status of change requests; providing responses to CLEC change requests; discussing responses during the monthly CMP meetings; modifying responses based on CLEC input when appropriate; and providing CLECs with web-based access to change requests and related documentation. Qwest has also met its obligations to hold regular CMP meetings; to providing meeting materials in advance of the meetings; and to record meeting discussion, action items, and issues. Further, Qwest has developed and maintains a CLEC and Qwest CMP Point of Contact list. In addition to demonstrating a pattern of compliance with its change management procedures, as discussed above, Qwest also has established a pattern of quickly implementing the agreements reached in the redesign process.

(v) Qwest has made available a stable testing environment that mirrors production.

Qwest has for some time jointly participated with CLECs in testing as CLECs develop EDI interfaces and migrate to new EDI releases. This certification process consists of three stages: (1) establishing connectivity, which verifies that Qwest and CLECs are able to pass transactional information to each other over a dedicated connection; (2) progression testing, either in Qwest's Interoperability environment or in its stand-alone test environment (SATE), in which CLECs submit predefined transactions to Qwest via the EDI interface to determine whether they receive appropriate responses from Qwest's system; and (3) controlled production, in which CLECs submit live actual requests to the Qwest production environment for provisioning as real production orders.

For phase (2) of the testing listed above, CLECs have two options. First, CLECs can conduct progression testing with Qwest by submitting transactions containing production data into the Interoperability test environment. Second, beginning August 1, 2001, Qwest has offered CLECs a stand-alone test environment (SATE) for certifying their system interfaces with Qwest's IMA-EDI system for testing new releases of IMA-EDI software. In SATE, Qwest makes test data available to CLECs and provides support teams to assist in testing and certifying CLEC interface software. To the extent possible, the test environment mirrors the production environment and is physically separate from the production environment.

KMPG evaluated the adequacy of Qwest's SATE as part of Test 24, Qwest CLEC Support Processes and Procedures Review.

(vi) Qwest provides documentation to CLECS that is effective in building an electronic gateway.

Qwest is providing technical documentation that effectively enables CLECs to build an interface to the IMA-EDI application. Qwest makes available to CLECs publications that detail the processes and procedures involved in establishing EDI interface, including the IMA-EDI Implementation Guide. To augment this documentation, Qwest makes available a CLEC-specific EDI Implementation Team consisting of a project manager, technical support engineer, and a business analyst. Moreover, Qwest provides CLECs with the IMA Disclosure Document that details the technical requirements for interfacing with Qwest via EDI.

In addition, effective with the IMA 10.0 Release lifecycle, Qwest will implement the following improvements: (1) provision of a scheduled walk-through of technical documentation of all CLEC technical subject matter experts who wish to participate; (2) implementation of a process by which CLECs have an opportunity to provide comments on the technical documentation, which Qwest will respond to in conjunction with the

release of the final technical documentation; and (3) improvement in notification intervals.

Qwest's experience in the third party testing precipitated changes in documentation and other process improvements. KPMG evaluated the adequacy of Qwest's interface development as part of Test 24. As of early February 20 CLECs were certified to use EDI, a strong indication of the efficacy of Qwest's EDI documentation and processes.

(vii) Qwest provides technical assistance to CLECs.

Finally, as part of its change management analysis, the FCC evaluates whether the BOC "is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them." Qwest offers CLECs an extensive array of training and assistance products and capabilities, including personalized guidance when establishing OSS interoperability (*i.e.*, a CLEC-specific implementation team); access via the wholesale website to documentation and information; instructor-led classroom training and web-based interactive training on multiple OSS-related topics; job aides and user guides; and widely available Help Desk support for troubleshooting and problem-solving. These assistance capabilities have been subjected to commercial usage. The technical assistance provided by Qwest to CLECs also has been evaluated by KPMG in its third party test. KPMG evaluated Qwest's CLEC training efforts as part of Test 24, Qwest CLEC Support Processes and Procedures Review.

The NDPSC recommends that Qwest's change management process satisfies the requirements of Section 271 because it provides nondiscriminatory access to OSS and provides competitors with a meaningful opportunity to compete.

o. Bona Fide Request Process

AT&T said the SGAT bona fide request process (BFR) could not be shown to be nondiscriminatory, because: (1) there is no evidence to show that it would apply similarly to the process Qwest uses when its own end users ask for services not already provided under tariffs; (2) Qwest fails to provide notice of previously approved BFRs with similar circumstances; and (3) Qwest has no objective standards for standardizing products or services that result from repeat BFR requests.

Qwest noted it has received only 17 BFR requests since 1999. Qwest objected to providing general notice of granted BFRs because a CLEC could object to providing a public notice about something it developed and requested and in which it therefore has a proprietary or trade secret interest. With respect to standardizing products or services made available through repeat BFRs, Qwest opposed a firm, objective standard, arguing that it should have the discretion to determine when conditions justified standardization.

Regarding the first aspect of AT&T's BFR request, the facilitator determined it would be misleading to broadly consider wholesale BFRs comparable with requests by Qwest end users for retail services. Therefore, the parity standard that AT&T suggests is not appropriate. The second aspect of AT&T's request concerns notice of previously granted BFRs. The facilitator determined CLECs should have prompt notice from Qwest when important technical feasibility barriers have been overcome. CLECs need to see the particular form of access to Qwest's network that Qwest will provide as a result of the BFR. That access, because it forms part of the requesting CLEC's "contract" with Qwest, should be available to other CLECs. A reasonable rule assuring nondiscrimination is to make knowledge of access so gained generally available. Accordingly, the facilitator recommended the SGAT should contain the following language:

Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under the SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.

The facilitator stated that Qwest may satisfy the latter, more detailed portion of this request by making the information available on the generally available list or by providing the information on request.

The third aspect of this issue concerns standardization of products and services first made available through BFRs. The facilitator determined there is not sufficient information, given the small number of BFRs to date, from which to determine whether Qwest can improve the process of moving from BFR to standardized product and service offerings. The facilitator recommended the SGAT language proposed above should do much to mitigate the costs associated with subsequent requests, including, in some cases, consideration of costs and prices. The facilitator stated that should experience demonstrate in the future, as it has not done to-date, that Qwest lags in standardized offerings, the dispute resolution procedures of the SGAT are available for CLECs to seek relief. AT&T did not comment on the facilitator's recommendation on this issue.

The NDSPC agrees with the facilitator's recommendation and finds Qwest has made the recommended addition to its SGAT at Section 17.15.

p. Scope of Audit Provisions

SGAT Section 18 limits allowable audits and examinations to "the books, records, and other documents used in the billing process for services performed" under the SGAT. AT&T wanted to expand the scope of these provisions, in order to allow audits and examinations of other aspects of performance under the SGAT.

Qwest responded that if AT&T had concerns in other areas of performance, it could use the SGAT's dispute resolution procedures to get any documents necessary to resolve them. Qwest stated that CLEC examinations would provide an opportunity for CLECs to get around the SGAT's dispute resolution discovery provisions merely by requesting an examination. Qwest also objected to the disruption that could occur in the case of unfettered CLEC examination rights across the broad spectrum of activities that Qwest must perform to meet its SGAT obligations.

The facilitator determined there is sound reason for extending the audit provisions to any question that may exist with respect to either party's compliance with requirements to protect confidential or proprietary billing information. However, there are valid concerns about extending examination rights to those cases. Examinations are not limited in number, which distinguishes them from audits. Therefore, while audits should be allowed in the case of compliance with proprietary information protections, examinations should not.

As to areas beyond billing and proprietary information, the PAP will address performance measurement auditing and other testing. The PAP will also address root cause analyses of persistent performance deficiency. There is no reason at present to question the sufficiency of these measures to assure quality and compliant performance, which is the purpose that audits and examinations would serve. The facilitator stated that, even if there were some reason to doubt the sufficiency of the PAP to address other areas of performance, the gravity of that doubt would have to be balanced against the potentially great inconvenience that could result from unconstrained CLEC examinations into any area of performance. The facilitator recognized the argument that confidentiality can be protected by the use of protective agreements, but stated that a practical conception of the use of such agreements must recognize that their effectiveness is inversely proportional to both the number of people who have access and the breadth of knowledge of the competitor's total business operations involved. The facilitator therefore recommended that the SGAT section on auditing should contain the following section to address audits of proprietary information use:

Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the

distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.

The facilitator stated that the granting of the right of the audited party to request an independent auditor is intended to reflect the particularly extensive access such an audit might require in organizations dealing with particularly sensitive information of the audited company. AT&T did not comment on the facilitator's recommendation on this issue.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended addition to its SGAT at Section 18.3.1.

q. Scope of Special Request Process

AT&T noted the SGAT limits the special request process (SRP) to UNE combination requests. AT&T stated that the SRP is more streamlined than the BFR process, because the SRP does not require a consideration of technical feasibility that must already have been established. AT&T argued the SRP should be available for all nonstandard offerings for which there is no question about technical feasibility. AT&T also incorporated by reference the parity arguments it made in connection with the BFR process.

The facilitator determined AT&T's request is reasonable; there is nothing unique about UNEs that make them any more or less amenable to SRP resolution than are other nonstandard elements or services. The facilitator stated that the language of SGAT Exhibit F, which addresses the SRP, however, extends beyond UNE combinations. The facilitator determined it was not clear what specific kind of expansion AT&T now seeks; therefore, the SGAT should be deemed as already providing an adequate basis for streamlined consideration of access to UNEs not yet subject to standard terms and conditions. The facilitator further determined that parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests. AT&T did not comment on the facilitator's recommendation on this issue.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

r. Parity of Individual Case Basis Process With Qwest Retail Operations

AT&T incorporated by reference the parity arguments it made in connection with the BFR process, to the individual case basis process.

The facilitator recommended the resolution proposed under the proceeding Bona Fide Request Process issue is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests. AT&T did not comment on the facilitator's recommendation on this issue.

The NDPSC agrees with the facilitator's recommendation and no changes to Qwest's SGAT are required.

4. Conclusion

Qwest should be deemed to have met the requirements of the Act with respect to the general terms and conditions of the SGAT.

C. Section 272 Separate Affiliate

1. Background

Section 272 of the Telecommunications Act imposes substantial structural and nonstructural safeguards applicable to the provision of in-region interLATA service by BOCs, such as Qwest. The FCC has said that § 271(d)(3)(B) of the Act makes noncompliance with § 272 an independent ground for denying relief under § 271.

Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cost subsidization between Qwest and its 272 affiliate, and (b) assuring that Qwest does not discriminate in favor of its affiliate.

2. Overview

The provisions of §272 that were in dispute during the workshop and which were presented to the N.D.P.S.C. with the facilitator's proposed resolution require that:

- Qwest Communications provide in-region interLATA service through an affiliate that is separate from Qwest Communications (the BOC) [§ 272(a)]
- The § 272 affiliate "maintain books, records, and accounts in the manner prescribed by the FCC, which shall be separate from the books, records, and accounts maintained by" Qwest Communications [§ 272(b)(2)]